APPEAL NO. 043109
FILED FEBRUARY 2, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 10, 2004. The hearing officer resolved the disputed issues by deciding that the appellant/cross-respondent (claimant) sustained an injury to his left shoulder in the course and scope of his employment on _____, but that the injury is not compensable because the respondent/cross-appellant (carrier) is relieved of liability under Section 409.002 because the claimant failed to timely notify his employer pursuant to Section 409.001; and that the claimant is not barred from pursuing workers' compensation benefits because of the alleged election to receive benefits under his group health insurance policy. The claimant appeals the hearing officer's determination that his injury is not compensable because he failed to timely notify his employer pursuant to Section 409.001, thus relieving the carrier of liability under Section 409.002. The carrier appeals the hearing officer's determinations that the claimant injured his left shoulder in the course and scope of his employment and that the claimant is not barred from pursuing workers' compensation benefits based on a defense of election of remedies. The carrier filed a response. The claimant did not file a response.

DECISION

Affirmed in part and reversed and rendered in part.

INJURY IN COURSE AND SCOPE

The claimant had the burden to prove that he was injured in the course and scope of his employment. The claimant, an assistant welder, testified that while he was using a bar with a hook on it to pull flash (excess material) off the winder machine at work, he stumbled back and his left shoulder popped. The next day he went to a hospital and was diagnosed with a left shoulder rotator cuff tear. Several months later, an MRI confirmed the rotator cuff tear. We conclude that the hearing officer's determination that the claimant sustained an injury to his left shoulder in the course and scope of his employment is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

ELECTION OF REMEDIES

The carrier had the burden of proving an effective election of remedies. Texas Workers' Compensation Commission Appeal No. 991934, decided October 11, 1999. In Bocanegra v. Aetna Life Insurance Company, 605 S.W.2d 848 (Tex. 1980), the Texas Supreme Court stated that the election doctrine may constitute a bar to relief when one successfully exercises an informed choice between two or more remedies, rights, or states of facts which are so inconsistent as to constitute manifest injustice.

The court noted that one's choice between inconsistent remedies, rights or states of facts does not amount to an election which will bar further action unless the choice is made with a full and clear understanding of the problem, facts, and remedies essential to the exercise of an intelligent choice.

There is evidence that the claimant knew that workers' compensation insurance is suppose to pay for medical benefits when he is hurt on the job and that he used his group health insurance to obtain treatment for his shoulder injury. The hearing officer found that the claimant was not aware that using his group health insurance might jeopardize his ability to assert a claim under the employer's workers' compensation policy and that the claimant did not make a voluntary, informed election to utilize his group health insurance in lieu of obtaining workers' compensation benefits. The hearing officer concluded that the claimant is not barred from pursuing workers' compensation benefits because of the alleged election to receive benefits under his group health insurance policy. In Texas Workers' Compensation Commission Appeal No. 93662, decided September 13, 1993, the Appeals Panel noted that it had not found inconsistency amounting to manifest injustice to the carrier arising simply from a sequential assertion of both group medical benefits and workers' compensation benefits without a particular articulation of the injustice suffered. The Appeals Panel has also said that the mere acceptance of health benefits is normally not sufficient in itself to establish an election of remedies. Appeal No. 991934, *supra*. We conclude that the hearing officer did not err in ruling in favor of the claimant on the election-of-remedies issue.

NOTICE OF INJURY TO EMPLOYER

The claimant had the burden to prove that he timely notified his employer of his injury or had good cause for failing to provide timely notice. Section 409.001(a) provides that an employee or a person acting on the employee's behalf shall notify the employer of the employee of an injury not later than the 30th day after the date on which the injury occurs. The claimant testified that on the day the injury to his left shoulder occurred at work, he reported the injury to his supervisor. He said that he told his supervisor that he popped his shoulder pulling flash and that his shoulder was numb. The claimant further testified that when his supervisor asked him if he wanted to go to the employer's nurse, he declined to go and told his supervisor that he would probably be all right because his shoulder was starting to get feeling back. The claimant said that his supervisor told him that he, the supervisor, had popped his arm doing the same thing. The claimant's supervisor testified that the claimant reported to him that his shoulder was sore and that he understood that the pain in the shoulder was related to the work the claimant was doing that day, but that the claimant declined medical care. The supervisor said that the claimant did not tell him that his shoulder popped.

The hearing officer found that shortly after the incident the claimant told his supervisor that his shoulder had popped and that the supervisor then told the claimant that he had also popped his shoulder pulling flash. The hearing officer found that the claimant told his supervisor that he did not need medical care and that he believed that

he was all right. The hearing officer further found that the claimant indicated to the supervisor that the incident had not resulted in damage or harm to his left shoulder and thus the reporting of the incident was insufficient to constitute a report of injury to the employer. The hearing officer concluded that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to notify his employer pursuant to Section 409.001. It appears that the hearing officer is relying upon the claimant's testimony that he told his supervisor that he would "probably" be all right and the fact that the claimant declined to go to the employer's nurse as negating a report of an injury.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). Whether the claimant gave timely notice of injury to the employer is a factual determination to be made by the hearing officer and will not be reversed on appeal to the Appeals Panel unless it is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. In DeAnda v. Home Insurance Company, 618 S.W.2d 529 (Tex. 1980), the Texas Supreme Court noted that to fulfill the purpose of the notice provision, the employer need only know the general nature of the injury and the fact that it is job related, and that more details of the occurrence will be supplied by the claim. In Houston General Insurance Company v. Vera, 638 S.W.2d 102 (Tex. App.-Corpus Christi 1982, writ ref'd n.r.e.), the court cited DeAnda for the proposition that the notice need not be given in any particular form and need not specify the exact nature of the injury or illness, since the requirement exists only to provide the insurer an opportunity to investigate. In Lewis v. American Surety Co., 143 Tex. 286, 184 S.W.2d 137, 140 (1944), which is cited in DeAnda, the Texas Supreme Court stated: "that great liberality should be indulged in determining the sufficiency and scope of such notices . . . ." The fact that a claimant told his supervisor that he was "okay" after he told the supervisor that he was knocked to the ground after hitting his head on a pipe did not preclude a finding of timely notice of injury in Texas Workers' Compensation Commission Appeal No. 93512, decided August 2, 1993.

In the instant case, we conclude that the hearing officer's determination that the claimant failed to notify his employer pursuant to Section 409.001 is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. It is clear that the hearing officer found that the claimant told his supervisor on the day he stumbled back while pulling the flash with the bar and hook that he had popped his shoulder. It is equally clear that the hearing officer believed that the supervisor understood that the popped shoulder occurred while the claimant was pulling the flash because the hearing officer found that the supervisor told the claimant that he had also popped his shoulder pulling flash. The fact that the supervisor may not have needed any medical attention when he popped his shoulder pulling flash sometime in the past does not mean that the claimant was not reporting an injury. Nor does the fact that the claimant told the supervisor that he would "probably be all right" and the fact that he declined going to the employer's nurse negate the notice of the popped shoulder. The claimant is not a doctor and would not be expected to be able to diagnose himself as having a torn rotator cuff. A doctor did that the next day. There may be instances where the purported notice of injury is so vague and indefinite that notice to the

employer is not found. A case in point is Texas Workers' Compensation Commission Appeal No. 002496, decided November 29, 2004, which is cited by the hearing officer. In Appeal No. 002496, the Appeals Panel affirmed a hearing officer's decision that the claimant did not timely report his alleged injury to the employer where the supervisor went to the scene of the claimant's motor vehicle accident on the date of the accident and the claimant told him he was "fine," the next day the claimant told the supervisor that he would have "no problem" driving another load, but when the supervisor asked the claimant if he was "stiff from the wreck," the claimant simply said "yes." The evidence regarding notice of injury in the case under review has much more substance than that provided in Appeal No. 002496 and we decline to expand our decision in that case to cases where the employee informs his supervisor that something has gone physically wrong with a specific body part from performing work activities.

We affirm the hearing officer's determinations that the claimant sustained an injury to his left shoulder in the course and scope of his employment on _____, and that the claimant is not barred from pursuing workers' compensation benefits because of an alleged election to receive benefits under his group health insurance policy. We reverse the hearing officer's determination that the carrier is relieved of liability under Section 409.002 because of the claimant's failure to notify his employer pursuant to Section 409.001, and we render a decision that the claimant timely notified his employer of an injury in accordance with Section 409.001 and that the carrier is not relieved of liability under Section 409.002. We reverse the hearing officer's decision that the claimant did not sustain a compensable injury based on the adverse notice determination and we render a decision that the claimant sustained a compensable injury to his left shoulder on _____. The carrier is ordered to pay benefits in accordance with the 1989 Act, the rules of the Texas Workers' Compensation Commission, and this decision.

The true corporate name of the insurance carrier is **ZURICH AMERICAN INSURANCE COMPANY** and the name and address of its registered agent for service of process is

LEE F. MALO
12222 MERIT DRIVE, SUITE 700
DALLAS, TEXAS 75251.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge